

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-1687

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1687

HOOKER CHEMICALS AND PLASTICS CORPORATION,
STAUFFER CHEMICAL COMPANY and
MONSANTO COMPANY,

Petitioners,

—v.—

RUSSELL E. TRAIN,

Respondent.

BRIEF OF AMICUS CURIAE
NATURAL RESOURCES DEFENSE COUNCIL

ANGUS MACBETH
EDWARD L. STROHBEHN, JR.
Natural Resources Defense Council
15 West 44th Street
New York, N. Y. 10036
Attorneys for Amicus Curiae

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RUSSELL E. TRAIN,

Respondent.

BRIEF OF AMICUS CURIAE,
NATURAL RESOURCES DEFENSE COUNCIL.

1/

STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court has jurisdiction under Section 309 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1369, to review regulations published by the Environmental Protection Agency pursuant to Sections 301, 304(b), 306, and 307 of the Act, 33 U.S.C. §§1311, 1314(b), 1316, 1317.

2. Whether effluent limitations established pursuant to Section 301 of the Act must be national standards which can be applied uniformly to point source dischargers within carefully defined classes and categories of point sources.

1/ Of the legal issues raised by this case, amicus NRDC will address only three as noted above. These issues have also been raised in other cases challenging EPA effluent limitation regulations, including two cases before this Circuit Court, NRDC v. EPA, Dkt. No. 74-1258 (2d Cir. filed Feb. 22, 1974) (variance clause) (case discussed in notes 80 and 109 infra), Uniroyal Inc. v. EPA, Dkt. No. 74-1691 (2d Cir.) (rubber processing). See also, E.I. DuPont de Nemours & Co. v. Train, Dkt. No. 74-1261 (4th Cir.) (inorganic chemicals manufacturing); FMC Corp. v. Train, Dkt. No. 74-1386 (4th Cir.) (plastics and synthetics manufacturing); Firestone Tire & Rubber Co. v. Train, Dkt. No. 74-1561 (6th Cir.) (rubber processing); National Independent Meat Packers Assn. v. EPA, Dkt. No. 74-1387 (8th Cir.) (meat processing) (issues raised by amicus curiae); Penick & Ford Ltd. v. Train, Dkt. No. 74-1449 (8th Cir.) (grain mills).

To date, EPA has issued final effluent limitation regulations for 30 major categories of point sources and 20 of these have been challenged. It can be anticipated that the legal issues addressed by amicus NRDC will be raised in many of these cases.

This amicus curiae brief does not address the merits of the regulations in issue. In sum, this amicus brief urges that the Court has jurisdiction of the issues raised by this case, that EPA's effluent limitation regulations should promulgate national, uniform standards, and that the rulemaking process by which the regulations were developed meets the requirements of the Administrative Procedure Act. Accordingly, amicus believes that this Court should address on the merits the issues raised by petitioners.

3. Whether the Environmental Protection Agency met the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§551-554, 701-706, in developing and promulgating the challenged regulations.

THE PARTIES

Petitioners are manufacturers of phosphate products, including the products subject to the regulations in issue in this case.

Respondent is Russell E. Train, Administrator of the Environmental Protection Agency.

Amicus curiae is the Natural Resources Defense Council, Inc. (NRDC), a national membership environmental organization, one of whose principal objectives is protection of our Nation's waters. NRDC, primarily through its Project on Clean Water, has monitored closely the implementation and enforcement of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251 et seq. since its enactment. NRDC's interests in this proceeding are stated in greater detail in its Motion For Leave to File Brief Amicus Curiae, which is filed herewith.

STATUTES AND REGULATIONS INVOLVED

Primarily, Sections 301 and 304 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1311, 1314, are involved.

The regulations in issue are those published by EPA on February 20, 1974, 39 Fed. Reg. 6579, which appear in the Record at pp. 1313-1319, and are set out in Appendix B of Petitioners' Brief.

STATEMENT OF THE CASE^{2/}

I. Introduction

The basic issue in this case is whether the Environmental Protection Agency (EPA) violated the Federal Water Pollution Control Act Amendments of 1972, (the "Act" or "FWPCA") by establishing national, uniform effluent limitation standards pursuant to Section 301 of the Act.^{3/} EPA's promulgation of these Section 301 regulations is central to achieving the Act's goal "that the discharge of pollutants into the navigable waters be eliminated by 1985,"^{4/} and to attaining the first major deadline of the Act for pollution reduction: that "effluent limitations established pursuant to [Section 301] . . . shall be applied to all point sources"^{5/} so that "there shall be achieved . . . not later than July 1, 1977, effluent limitations . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act. . . ."^{6/}

^{2/} Amicus found that Petitioners' "Statement of the Case" was incomplete and that it failed properly to present the history, structure, and intended operation of the Act. Since proper interpretation of key provisions of the Act are in issue, Amicus considered it imperative to present a careful and comprehensive statement of the case regarding the jurisdictional and statutory issues involved.

^{3/} Public Law No. 92-500, Oct. 18, 1972, 86 Stat. 816, 33 U.S.C. §1251 et seq., 1311.

^{4/} Section 101(a)(1), 33 U.S.C. §1251(a)(1).

^{5/} Section 301(e), 33 U.S.C. §1311(e).

^{6/} Section 301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A).

In order to understand the conflicting statutory interpretations of EPA and petitioners and their implications for achievement of the Act's goals, it is necessary to summarize briefly the relationships of the basic statutory provisions involved in this case. In sum, Section 301(a) makes the discharge of any pollutant by any person unlawful except as allowed by permit.^{7/} Permits, issued under Section 402, are granted only to those dischargers who comply with the standards established by the Act.^{8/} These standards include the effluent limitations involved in this case.^{9/} Effluent limitations for new point sources are defined and established by Section 306.^{10/}

^{7/} 33 U.S.C. §1311(a); see detailed discussion at pages 14-15, infra.

^{8/} 33 U.S.C. §1342; see detailed discussion at pages 20-23, infra.

^{9/} The phrase "effluent limitations" is used here for simplicity. For existing point sources, the statutory phrase is "effluent limitations," 33 U.S.C. §§1311(b)(1)(A), (e). The standards which such effluent limitations must meet are "best practicable control technology currently available" for mid-1977, and "best available technology economically achievable" for mid-1983. 33 U.S.C. §§1311(b)(1)(A), (b)(2)(A). For new point sources, the statutory phrase is "standard of performance," and the standard is "best available demonstrated control technology," 33 U.S.C. §1316(a)(1).

^{10/} 33 U.S.C. §1316. Petitioners do not contest the jurisdiction of this Court to review EPA's regulations as they concern new source standards of performance, see Case No. 74-1683, filed by petitioners. And petitioners state: "However, EPA promulgated both sets of regulations at the same time and its factual bases and rationale for the two regulations are similar and in some cases identical." Petitioners Brief, at 4-5.

For existing point sources, both industrial and municipal, effluent limitations are established by Section 301 as defined pursuant to Section 304(b).^{11/} Permits may be issued by EPA or by those states whose permit programs have been approved by EPA^{12/} and which comply with the requirements of the Act, including the Section 301 and Section 306 effluent limitations.^{13/}

The regulations establishing the effluent limitations under Section 301 for classes and categories of industry are reviewable in the U.S. Court of Appeals pursuant to Section 509.^{14/} Enforcement of individual permit conditions is by suit in a U.S. District Court pursuant to Sections 309^{15/} and 505.^{16/}

At its root, the statutory scheme for abating industrial point source pollution is based on federally established

^{11/} 33 U.S.C. §§1314(b), 1311(b)(1)(A); see detailed discussion at pages 14-20, infra.

^{12/} 33 U.S.C. §1342(b); see detailed discussion at pages 18-19, infra.

^{13/} 33 U.S.C. §1342(b); see detailed discussion at pages 20-23, infra.

^{14/} 33 U.S.C. §1369.

^{15/} 33 U.S.C. §1319 (enforcement by federal authorities); see detailed discussion at page 20, infra.

^{16/} 33 U.S.C. §1365 (enforcement by citizen suits); see detailed discussion at page 20, infra.

effluent limitations which are applied and enforced by EPA or by the states pursuant to federal oversight and control.

Accordingly, in order to meet its obligations under the Act, EPA undertook a rulemaking proceeding by which it developed and promulgated effluent limitations and guidelines pursuant to Sections 301, 304(b), (c), 306(b), and 307(c)^{17/}, for a number of industrial categories of point sources, one of which is the phosphate manufacturing category involved in this proceeding. After EPA promulgated final regulations, petitioners filed their Petition for Review in which they contend, inter alia, that this Court lacks jurisdiction to review EPA's actions establishing effluent limitations for existing point sources and that, in any event, EPA cannot by regulation establish nationally uniform effluent limitations for existing point sources.

In sum, petitioners contend that EPA's rulemaking effort - which has been underway for more than a year, with extensive participation by petitioners - is invalid.^{18/}

^{17/} See "Advance Notice of Public Review Procedures," 38 Fed. Reg. 21202 (1973), as well as pertinent notices regarding the proceeding by which the contested regulations were developed and promulgated, 38 Fed. Reg. 24470 (1973); 39 Fed. Reg. 6580 (1974).

^{18/} Notice of proposed rulemaking issued 38 Fed. Reg. 24470 (1973); see comments by petitioners set forth in the record.

Petitioners assert that effluent limitations for existing point sources can be established only in each individual permit proceeding, of which there will be approximately 75,000,^{19/} and that this Court lacks jurisdiction to review such effluent limitations.

If petitioners' interpretation were to prevail, one of the basic objectives of the Act which Congress devised after a quarter century of ineffective federal water pollution control legislation would be defeated: creating national, uniform, point source effluent limitations which are to be made increasingly more stringent over time to the end that "the discharge of pollutants into the navigable waters be eliminated by 1985."^{20/} Petitioners' interpretation would require that the basic standards for regulating existing point source discharges be established on an ad hoc, individualized permit by permit basis, often by the states. In effect, petitioners' interpretation would revive the procedure of prior federal water pollution control legislation which Congress found to be ineffective and inadequate.^{21/}

Because petitioners' discussion of the statutory framework is inadequate and a proper understanding of the Act's

^{19/} See EPA, Water Quality Strategy Paper, 2d Edition, at 2 (March 15, 1974).

^{20/} Section 101(a)(1); 33 U.S.C. §1251(a)(1).

^{21/} See, e.g., statement of Representative Vanik, quoted in note 27, infra.

structure is essential, a detailed discussion of the Act's comprehensive, carefully integrated mandatory scheme for water pollution control is presented in Part II below. Then, in Part III, the rulemaking proceeding by which the contested regulations were developed and promulgated is described.

II. Federal Water Pollution Control Act Amendments of 1972

A. Background of the Act

The Federal Water Pollution Control Act Amendments of 1972^{22/} culminates 26 years of effort by the Congress "to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset."^{23/} Congress recognized that a basic problem with prior legislation was that uniform, national, mandatory water pollution control standards

^{22/} 33 U.S.C. §1251 et seq. (hereafter "Act" or "FWPCA").

^{23/} H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 66 (1972); Leg. Hist. 753. The Senate Committee on Public Works has published a detailed two-volume legislative history of the Act. It contains the Act, the President's veto message, excerpts from the Conference, Senate, and House Reports, and excerpts from Senate and House debates. Senate Committee on Public Works (Library of Congress), A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973) (Comm. Print) (2 vols.). Citations to this compilation of the legislative history will be: "Leg. Hist. ____."

had not been established.^{24/} As a result, industries could shop among local jurisdictions for those which for reasons of economic development, local dependence on a dominant industry, or lack of concern for the effects of pollution would grant the industry permission to discharge pollutants to the nation's waters at rates exceeding the national standard. Therefore, Congress repeatedly emphasized in the legislative history the importance of establishing national uniform effluent limitation standards.^{25/}

National uniformity was the first consideration which Senator Muskie, principal author of the Act, laid before the Senate during its final debate on the bill:

"Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.

As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977. This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must be uniform, and that they will be final upon the issuance of a permit under section 402 of the bill."^{26/}

^{24/} See, e.g., the legislative history cited in notes 33 and 122, infra.

^{25/} Id.

^{26/} Leg. Hist. at 162.

To achieve this "uniformity" objective, Congress first established a series of national water pollution control goals, the first of which is the 1977 effluent limitation based on the "best practicable" control technology noted in the quotation. Congress then devised a comprehensive, carefully integrated water pollution control program which applied these uniform effluent limitations on an increasingly strict basis for dischargers. At the same time, Congress recognized the substantial differences which exist among dischargers and developed methods for accounting for these differences while applying the system of uniform limitations: EPA was instructed to develop the limitations for specific, carefully defined classes and categories of point sources which are similar in their control technology requirements. Finally, Congress established a detailed enforcement system which is based upon and ensures compliance with nationally uniform effluent limitations. As will be seen, the keystone of this system is Section 301, and the proper interpretation of this section is the basic issue in this case.

It is important to emphasize at the outset two factors which are critical to proper understanding of the portions of the Act involved in this case - both involve substantial shifts from the water pollution control approach of previous legislation; both involve more effective federal control. The first is Congress' determination to limit the discretion of those administering the Act. As Senator Randolph, Chairman

of the Senate Committee on Public Works, stated:

" . . . I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow

In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do."^{27/}

The second is Congress' determination to prescribe enforceable federal standards. Thus, perhaps the most important innovation of the 1972 Act is the adoption of technology-based, nationally uniform effluent limitations to control pollution from point sources,^{28/} instead of sole reliance upon water quality

^{27/}

Leg. Hist. 1272 (Senate debate on passage of Senate bill). It is important to note that a principal motivating force for the 1972 Amendments was extreme dissatisfaction with the inadequacies of existing laws. During House debate on the bill, for example, Representative Vanick stated:

"Amendments and improvements in our water pollution control laws are desperately needed now, because, as I have just stated, conditions are getting worse, and second, the present control efforts are administratively unworkable and philosophically faulty." Leg. Hist. 494 (emphasis added).

See also Leg. Hist. 99 (Statement of Representative Jones); Sen. Rep. No. 92-414, 92d Cong., 1st Sess. 407 (1971), Leg. Hist. 1422-25.

^{28/}

See S. Rep. No. 92-414, note 27, supra, at 12; Leg. Hist. 1425.

standards. Congress found that the 1965 water quality standards program was "limited in its success,"^{29/} and adopted "this substantial change [to technology-based effluent limitations] because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality."^{30/} Congress determined that precise effluent limitations which would be "defendable in court"^{31/} were necessary to cleaning up the nation's waters.

Thus:

"Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.

The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality." ^{32/}

And Congress also determined that effluent limitations must be uniform across the nation to prevent industries from "forum

^{29/} S. Rep. No. 92-414, note 27, supra, at 12; Leg. Hist. 1426.

^{30/} Id.

^{31/} Id.

^{32/} Id. (emphasis added).

shopping" among the states.^{33/}

B. The Statutory Framework for Effluent Reduction

With this background in mind, we can turn to detailed analysis of the Act. The ultimate objective of the Act is forcefully and explicitly stated: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."^{34/} A principal goal of the Act is "that the discharge of pollutants into the navigable waters be eliminated by 1985."^{35/} In order to reach this goal, Congress directed in Section 301 that all discharges are unlawful unless allowed by a permit issued pursuant to Section 402. These permits require compliance with the Act's requirements which, relevant to this case, are the effluent limitations established under Section 301.

^{33/} Congress was quite concerned with the problem of non-uniform national effluent limitation standards and the possibility of states attempting to attract industry by establishing less stringent standards. During debate on the Senate bill, Senator Muskie stated: "[U]nless there is uniformity of regulation, polluters will seek to escape stringent requirements of one area, and they will go to other areas where there are less stringent requirements." Leg. Hist. 1405. See Leg. Hist. 263, 452-53, 473-75, 516-17, 577, 711.

^{34/} Section 101(a), 33 U.S.C. §1251(a).

^{35/} Section 101(a)(1), 33 U.S.C. §1251(a)(1).

Congress required that "effluent limitations established pursuant to [Section 301]. . . shall be applied to all point sources"^{36/} so that, by July 1, 1977, the discharge of effluents from industrial polluters will be limited to the level attainable by applying the "best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b)(1)(A) of the Act."^{37/} By July 1, 1983, a higher standard is to be met and the industrial effluent limitations require the application of the "best available technology economically achievable" as determined pursuant to Section 304(b)(2)(A).^{38/} In essentially identical language for both the 1977 and 1983 standards, Section 304(b) directs the Administrator to publish regulations which shall identify "for classes and categories of point sources" the degree of effluent reduction attainable by application of the appropriate control technology.^{39/}

This effluent limitation portion of the Act's water pollution control scheme is premised on regulating discharges at their sources by means of technological controls which can

^{36/} Section 301(e), 33 U.S.C. §1311(e).

^{37/} Section 301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A).

^{38/} Section 301(b)(2)(A), 33 U.S.C. §1311(b)(2)(A).

^{39/} Section 304(b)(1)(A), (b)(2)(A), 33 U.S.C. §§1314(b)(1)(A), (b)(2)(A).

be applied to limit and eventually eliminate the discharges. Since both polluting discharges and control technology vary widely from industry to industry and also within broad industrial categories,^{40/} Congress developed a method for accounting for these differences so that national uniform effluent limitations could be developed and applied. Congress required Section 301 effluent limitations to be based on specific, carefully defined classes and categories of point source dischargers as identified by Section 304(b) guidelines.

For the 1977 standard these guidelines are to identify the best practicable control technology currently available for each class and category of point sources.^{41/} In addition, the guidelines are to specify factors taken into account in reaching that determination, including costs in relation to effluent reduction benefits, the age of the equipment and facilities involved, the industrial processes and the engineering aspects, the non-water quality environmental impacts, and such other factors as the Administrator deems appropriate.^{42/}

^{40/} Thus, the wastes of dairy product processing differ markedly from that of iron and steel manufacture, and the wastes from a cast iron foundry differ from those of a sheet steel manufacturer. It is also true that control technology varies from industry to industry and within the categories and classes of each industry in terms of such factors as age of equipment, process changes, and non-water quality environmental impacts involved in the use of the technology.

^{41/} Section 304(b) (1) (A), 33 U.S.C. §1314(b) (1) (A).

^{42/} Section 304(b) (1) (B), 33 U.S.C. §1314(b) (1) (B).

A similar and parallel identification and analysis is to be undertaken in developing the standards for 1983.^{43/}

"Uniformity" was the basic rationale for establishing Section 301 effluent limitations for specific classes and categories of point sources, as was emphasized by Senator Muskie, principal author of the Act, in discussing the changes to Section 304 which were made in Conference:

"The modification of subsection 304(b)(1) is intended to clarify what is meant by the term 'practicable.' The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community."^{44/}

The point is restated and emphasized in the Conference Report on the bill:

"The conferees intend that the Administrator or the State, as the case may be, will

^{43/} Section 304(b)(2), 33 U.S.C. §1314(b)(2).

^{44/} Leg. Hist. at 170.

make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." 45/

It is this analysis of water pollution control technology by classes and categories of industrial dischargers which is reflected in the guideline regulations of Section 304 and which, in turn, define the Section 301 point source effluent limitations. These Section 301 effluent limitations are the central standard and benchmark for the operation and enforcement of the effluent abatement scheme of the Act. Senator Muskie, principal author of the Act, summarized this close relationship between Sections 301 and 304 in discussing the Conference Report on the bill:

"It is the intention that pursuant to subsection 301(b)(1)(A) and Section 304(b), the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by July 1, 1977." 46/

These effluent limitations established by Section 301 are then applied to individual dischargers by means of the permit system established by Section 402 of the Act and designated

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S. Rep. No. 92-1236 (Conf. Rep.), 92d Cong., 1st Sess. 121 (1972), Leg. Hist. at 304.

46/

Leg. Hist. at 169.

the National Pollutant Discharge Elimination System ("NPDES")^{47/}.
Under NPDES, the Administrator, or a state official pursuant
to a federally approved state permit program,^{48/} may issue a per-
mit for the discharge of a pollutant on the condition that
the discharge will meet all applicable requirements of the
Act including the technological control standards for existing
sources under Section 301 or for new sources under Section 306.^{49/}

^{47/} The Section 402 permit program is another change of major importance from prior water pollution control legislation. It represents an extension and expansion of the permit program which had been developed by the Administration under the authority of the Refuse Act of 1899. 33 U.S.C. §407. See H. R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972); Leg. Hist. 812. The point source effluent limitation standard-setting scheme and the permit program form one of the essential new pollution abatement methods established by the Act.

^{48/} Assumption of authority by the states for issuing permits does not affect in any way the uniform, national character of the water pollution abatement scheme established by the Act. The state permit program must comply with requirements of Section 402, it must insure that all applicable requirements established by the Act, including Section 301 effluent limitations, are complied with, and it must be terminated if it at any time after approval fails to meet these requirements, among others. Section 402(b) - (f), 33 U.S.C. §1342(b) - (f).

^{49/} Section 402, 33 U.S.C. §1342. Other applicable requirements which permittees must meet are: Section 302 (water quality standards); Section 307 (toxic discharge standards); Section 308 (inspection and monitoring requirements); and Section 403 (ocean discharges). See 33 U.S.C. §§1312, 1317, 1318, 1343.

Finally, the Act establishes two enforcement schemes for insuring compliance with Section 301 effluent limitations. Enforcement by the federal Administrator is provided by Section 308 which requires the Administrator to take action if he finds any person to be in violation of either Section 301 or a permit condition or limitation established under Section 402.^{50/} Citizen enforcement is provided by Section 505 which allows citizens to bring suit against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this Act" ^{51/} Section 505 explicitly defines "effluent standard or limitation" to include "an effluent limitation or other limitation under Section 301 or 302 of this Act."^{52/} All of the enforcement provisions explicitly require compliance with effluent limitations established by Section 301 independent from compliance with Section 402 permit requirements.

C. The Permit System

Full understanding of the legislative scheme for abating industrial pollution requires careful analysis of the permit

^{50/} Section 309, 33 U.S.C. §1319.

^{51/} 33 U.S.C. §1365(a)(1).

^{52/} 33 U.S.C. §1365(f)(2).

issuing process since it is at the heart of the regulatory system and provides the method for applying national standards to individual dischargers. At the outset, it is important to emphasize three factors: (1) implementing the Section 301 effluent limitation scheme in individual permits is not a simple mechanical process of applying the appropriate Section 301 effluent limitation to a particular discharger; (2) permits must require compliance with a large number of requirements other than Section 301; (3) development of national, uniform effluent limitations in a general rulemaking proceeding makes accomplishment of the Act's requirement that all permits (which are expected to amount to about 75,000^{52a/}) be issued by December 31, 1974, a feasible goal - one which would appear to be impossible if each individual permit proceeding were to be a de novo effluent limitation standard setting proceeding.

In applying the Section 301 effluent limitations to a particular discharger, the permitting authority must first determine which point source class or category the applicant is in. The authority must also determine the exact production process or processes used by the applicant, since several different processes are often used to produce the same product and each process may produce different types and quantities of pollutants for which the Section 301 effluent limitations may differ.^{53/} Then, since effluent limitations are almost

^{52a/} See note 19, supra.

^{53/} See, e.g., the final regulations concerning inorganic chemicals manufacturing for hydrogen peroxide manufacture by the oxidation of alkyl hydroanthraquinones and by the electrolytic process, 40 C.F.R. §415.92(a) and (b), 39 Fed. Reg. 9625 (1974).

always expressed in measures of weight of pollutant per unit of production (which allows different amounts of discharge for different sized plants), the applicant's quantity of production must be determined.^{54/} This information is sometimes claimed by prospective permittees as a trade secret and must be obtained by the permitting agency under legal authority with appropriate guarantees of confidentiality.^{55/} Finally, the permitting authority must establish a schedule of compliance which "means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."^{56/} The importance of developing this schedule was underscored by Senator Muskie during final Senate debate on the Conference Report when he stressed that the July 1, 1977, compliance date established by Section 301 is the maximum time allowed; the Administrator is expected to achieve the Section 301 effluent limitation standards sooner if possible.^{57/} Determining the proper compliance schedule requires detailed knowledge of the applicant's

^{54/} See, e.g., Id. and regulations in issue in this proceeding, 40 C.F.R. §§422.12, .22, .32, 39 Fed. Reg. 6580 (1974).

^{55/} See Section 308(b), 33 U.S.C. §1318(b).

^{56/} Section 502(17), 33 U.S.C. §1362(17).

^{57/} See quotation in text on page 10, supra.

industrial process and effluent and information about the availability of relevant control technology. In addition, the permit must contain monitoring and reporting requirements regarding the contents of the permittee's discharges.^{57a/} Thus, issuing a permit for an industrial point source discharge is not a simple, mechanical matter; and the determinations set out here are only a few of those required by Section 402.^{58/}

In sum, national uniform Section 301 effluent limitations are essential to effective operation of the permit system; without such standards, it would be extremely difficult for the permitting authority in any reasonable time to make the many determinations he is required to make in establishing permit conditions. And the Act requires all permits to be issued by December 31, 1974.

The Act is founded on a logical pattern. Section 301 of the Act sets out the general standards for effluent limitations. Section 304 provides for the development of the information and guidelines on which the 301 standards for classes and categories of industry are to rest. When the effluent limitations of 301 are defined pursuant to 304 and established pursuant to 301(e), they provide a uniform national system of technological control which is reduced to concrete expression in a permit issued under Section 402. The 402 permits are enforced under 309 and 505 by reference to the permit itself,

^{57a/}
See Section 308, 33 U.S.C. §1318.

^{58/}
See Section 402, 33 U.S.C. §1362.

to the 301 effluent limitation, and to the other restrictions imposed by the Act.

III. The Rulemaking Process

The regulations challenged by industry in this case were adopted pursuant to Sections 301, 304, 306, and 307 and consist of effluent limitations, effluent limitation guidelines, standards of performance, and proposed pretreatment standards. The regulations were formulated pursuant to a single, detailed, lengthy development and rulemaking process which involved substantial participation by petitioners as well as other interested parties, including the public.

It is important to emphasize that on August 6, 1973, before EPA had published a single proposed regulation, it published an "Advance Notice of Public Review Procedures" which set out the specific steps of EPA's process for developing the regulations in issue.^{59/} The purpose of the notice was to facilitate public comments on the regulations.^{60/} The rulemaking process described in detail in the Advance Notice and followed with respect to the challenged regulations is summarized below.

First, EPA established the broad industrial categories for which it would develop effluent limitations, a list which

^{59/} 38 Fed. Reg. 21202 (1973).

^{60/} Id.

was revised as EPA acquired more detailed knowledge of industrial processes, discharges, and control technology.^{61/} Currently, EPA expects to publish guidelines for approximately 68 industrial categories.^{62/} EPA further analyzed each broad industrial category to determine whether separate limitations and standards were necessary for different segments within the category based on differences in raw materials, products, processes, age and size of equipment and facilities, waste water constituents and other factors.^{63/} For example, the regulations for the phosphate manufacturing category challenged here involve 3 subcategories within that industry.^{64/}

^{61/} The analysis which follows is based on knowledge acquired by NRDC's Project on Clean Water and by other NRDC staff members as well as on EPA public documents and other literature, such as newsletters. Much of this information was presented to the United States District Court for the District of Columbia in the case of NRDC v. Train, Civ. Dkt. No. 1609-73, 6 ERC 1033 (D.D.C. 1973) Dkt. No. 74-1433 (D.C. Cir. Dec. 5, 1974). This case involved EPA's failure to meet the statutory deadline for promulgating regulations required by Section 304(b)(1)(A).

^{62/} See NRDC v. Train, 6 ERC 1033 (D.D.C. 1973), which lists these categories.

^{63/} See 38 Fed. Reg. 21202, 21203 (1973).

^{64/} 39 Fed. Reg. 6580 (1974).

Second, EPA conducted, generally by contract with independent consultants in cooperation with EPA personnel, extensive and detailed technical and economic analyses of selected categories and subcategories.^{65/} These contracts generally required submission to EPA of draft reports, which contained draft guidelines, in six months and final reports in eight months.^{66/}

Third, EPA solicited comments on the draft contractors' reports from the affected industries as well as from interested persons, such as environmental organizations.^{67/} Generally, as in this case, the affected industries submitted extensive comments.

Fourth, based on the materials, data, and comments noted above, EPA issued proposed regulations and, at the same time

^{65/} See generally discussion in preamble to proposed and final regulations challenged herein, 38 Fed. Reg. 24470 (1973), 39 Fed. Reg. 6580 (1974).

^{66/} Id.

^{67/} See EPA "Advance Notice of Public Review Procedures," 38 Fed. Reg. 21202-06 (Aug. 6, 1973) ("[This] notice is divided into three parts. First, the basic legal authority for regulations concerning effluent limitations guidelines and standards of performance will be set forth. Second, EPA's general methodology will be described. Third, the means by which EPA has to date, and will in the future, seek the widest possible public scrutiny of the technical and legal basis for the regulations to be established will be explained.").

or shortly thereafter, published a draft development document and an independent economic analysis analyzing a broad range of control technologies and providing the technical and economic basis for the proposed regulations.^{68/}

Fifth, EPA solicited additional public comments on the proposed regulations, often extending the public comment period in order to meet the requests of interested parties.^{69/}

Finally, more than a year after initiating the process of developing the regulations, EPA promulgated final regulations followed by publication of a final development document and economic analysis.^{70/}

It is important to emphasize that the development documents and contractors' reports are formidable documents, generally consisting of several hundred pages,^{71/} and are an integral part of the rulemaking process. They contain the detailed data and analysis which underlie and support the

^{68/} See, e.g., Proposed Regulations for Phosphate Manufacturing, 38 Fed. Reg. 24470 (1973); the Draft Development Document and Draft Economic Analysis are printed in the record.

^{69/} See, e.g., Proposed Regulation for Phosphate Manufacturing, 38 Fed. Reg. 24470 (1973).

^{70/} See, e.g., Final Regulations for Phosphate Manufacturing, 39 Fed. Reg. 6580 (1974), The Final Development Document and the Final Economic Analysis are printed in the record.

^{71/} See Record.

regulations. Criticism of these documents during the rule-making process results in reassessment, revision, and, often, additional research and analysis so that the final development documents provide adequate support for the regulations.^{72/}

This rulemaking process has been applied generally and produced the regulations in issue in this case which establish Section 301 effluent limitations, Section 304 effluent limitation guidelines, and Section 306 standards of performance for the phosphate manufacturing category.

^{72/} See Affidavit of Lillian D. Regelson, Deputy Administrator, EPA, Aug. 12, 1974, submitted in NRDC v. Train, Civ. Dkt. No. 1609-73 (D.D.C.).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS ACTION WHICH SEEKS REVIEW OF EFFLUENT LIMITATIONS PROPERLY PROMULGATED BY REGULATION UNDER SECTION 301 OF THE ACT.

The Court has jurisdiction over this action under Section 509(b)(1) of the Act:

"Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person." ^{73/}

EPA promulgated the contested regulations pursuant to Sections 301, 304, 306, and 307 of the Act, ^{74/} thereby establishing standards of performance and effluent limitations under the terms of Section 509. The petitioner is an interested party and has properly brought the action before this Court. This Court has

^{73/} 33 U.S.C. §1369(b)(1). Petitioners contend that a December, 1973 amendment of Section 509, which amendments simply corrected "'oversights or incorrect references,'" supports their position. Petitioners' Brief at 11. That the amendment did not add to Section 509 a reference to Section 304(b) means that no such amendment was necessary and thus supports amicus' position.

^{74/} 39 Fed. Reg. 6580 (1974) ("This final rulemaking is promulgated pursuant to Sections 301, 304(b) and (c), 306(b) and (c), and 307(c)").

jurisdiction.

This conclusion has been judicially confirmed as correct by all of the courts which have rendered decisions on the issue. Two U.S. District Courts have held that the EPA effluent limitation guideline regulations promulgated under, inter alia, Sections 301 and 304 of the Act which are in issue in this case, are reviewable only in the U.S. Courts of Appeals under Section 509 of the Act, and accordingly, have dismissed cases seeking District Court review of these regulations. E.I. DuPont de Nemours & Co. v. Train, 7 ERC 1065 (W.D. Va. Sept. 24, 1974) (inorganic chemicals manufacturing) (the court held that "the Administrator was authorized to promulgate by regulation the effluent limitations in issue [and] . . . that judicial review of these limitations and guidelines is exclusively in the Court of Appeals under Section 509(b)(1)(E)." At 1069); American Paper Institute v. Train, Civ. Dkt. No. 74-814 (D.D.C. Sept. 20, 1974) (the court held that the regulations in issue established effluent limitations and, therefore, that "§509 provides for review by a United States Court of Appeals and not by a United States District Court." Slip Op. at 2).

The United States Court of Appeals for the District of Columbia Circuit, in a lengthy opinion which is the first detailed judicial interpretation of the requirements of, inter alia, Sections 301 and 304 of the Act, upholds amicus's interpretation of these sections. NRDC v. Train, Dkt. No. 74-1433 (D.C. Cir. Dec. 5, 1974). Thus, the Circuit Court stated:

"The Act's text and its legislative history make clear that as a general matter section 304(b)(1) guidelines and the section 301(b)(1) limitations were to be developed prior to the issuance of permits." Slip Op. at 29-30 (emphasis added)

"Although Congress contemplated that the permit program would be begun before establishment of the section 301 effluent limitations, we believe it intended that EPA formulate effluent limitations for the great bulk of point source categories prior to completing the permit process for existing polluters." Slip Op. at 32.

"The effluent limitation guidelines contained in section 304(b) and the corresponding effluent limitations to be promulgated under section 301(b) were intended to safeguard against industrial pressures by establishing a uniform 'minimal level of control imposed on all sources within a category or class.'" Slip Op. at 33-34 (quoting from Senator Muskie).

In addition, several petitions for review of other effluent limitation regulations have been filed under Section 509 of the Act and have not contended that the Court of Appeals lacks jurisdiction of the subject matter of the case. See, e.g., Reynolds Metal Co. v. EPA, Dkt. No. 74-1760 (4th Cir.); National Independent Meat Packers Assn. v. EPA, Dkt. No. 74-1387 (8th Cir.); Tanners Council of America, Inc. v. Train, Dkt. No. 74-1740 (4th Cir.); American Meat Institute v. EPA, Dkt. No. 74-1394 (7th Cir.).

In this case, petitioners contend that this Court lacks jurisdiction on the ground that effluent limitation regulations for existing sources were not and could not be legally promulgated under Section 301 but only under Section 304 and review

of the Administrator's actions under Section 304 may be had only in U.S. District Courts under the Administrative Procedure Act,^{75/} and the jurisdictional provisions of the Judicial Code.^{76/} In addition, petitioners contend that Section 301 effluent limitations can be established only in the process of issuing permits to individual dischargers pursuant to Section 402.

This attack on jurisdiction serves as the platform from which petitioners attempt to dismantle the interpretation of the Act on which EPA has erected its regulation of polluting dischargers. Petitioners' interpretation of the Act is not only Byzantine in its complexity when compared to the straightforward reading of the Act urged by EPA and Amicus, but it is also fatally defective in failing to account for the plain wording of the Act, its structure, and its legislative history. Accordingly, Petitioners' proposed reading of the Act and their contentions that this Court lacks jurisdiction to review the regulations in issue should be rejected and their petition should be ruled upon on the merits.

^{75/} 5 U.S.C. §§701-706.

^{76/} 28 U.S.C. §§1331, 1332, 1337, 1361, 1651.

A. The Act Mandates the Establishment of Section 301 Effluent Limitations

Both by the Act's explicit language and by establishing an integrated statutory structure which is consistent only with that explicit language, Congress made clear that Section 301 effluent limitations must be established pursuant to Section 301 itself and independent of Section 402.

1. The Language of the Act

Throughout the title of the Act covering "Standards and Enforcement," the Act speaks simply and explicitly of effluent limitations "established by Section 301." Thus, and most importantly, Section 301(e) states:

"Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."^{77/}

Simply stated, Section 301(e) contemplates establishment of Section 301 effluent limitations according to the requirements of Section 301. Moreover, Section 301(e) makes clear that the effluent limitations "established" under Section 301 "shall be applied to all point sources," by means such as permits issued under Section 402.

^{77/} 33 U.S.C. §1311(e) (emphasis added).

Section 301(e)'s explicit language demonstrates the fundamental error of petitioners' interpretation of the Act that:

"Section 301 carefully provides that the 'objective' to be 'achieved' is effluent limitations at the technical level described, not that the effluent limitations be separately established by rule." Pet. Brief at 17-18 (emphasis added).

Other statutory provisions replicate the language of Section 301(e) and underscore petitioners' error, Section 306(b) ("Any standard established pursuant to Section 301") and Section 316(c) ("effluent limitations established under Section 301"). In addition, several statutory provisions use phrases of similar import - "effluent limitations under Section 301" in Sections 401(a)(1), 401(d), 505(f), 507(d), and 509(b)(1)(E); or "effluent limitations required by [or "under"] Section 301" in Sections 302(a), 303(d)(1)(A), and 303(c)(3)(A).

The language of these provisions makes clear that the Act intends that effluent limitations are to be established under Section 301 and independent of Section 402, thereby wholly refuting petitioners' interpretation. This is the course which the EPA Administrator has followed in the challenged regulations and it is the proper legal course.

2. The Statutory Structure

Analysis of the statutory structure for developing,

applying, and enforcing effluent limitations underscores the conclusion reached above: Section 301 effluent limitations are to be established under Section 301 itself. A detailed analysis of the statutory structure which demonstrates that this conclusion is correct is set out at pages 14-20, supra. Only the more salient aspects will be emphasized below.

First is the explicitly stated relationship between Sections 301 and 304. Section 301 requires that "effluent limitations established pursuant to [this] section . . . shall be applied to all point sources" which limitations "shall require application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of the Act" ^{78/} The close relationship of Sections 304(b) and 301 has been set out above. ^{79/} Here it is relevant to emphasize simply that the information and analysis developed pursuant to Section 304 serves as the basis for defining ^{80/} the effluent limitations which are established under Section 301.

^{78/} 33 U.S.C. §1311(e), (b)(1)(A), (b)(1)(B) (emphasis added).

^{79/} See pages 14-18 supra,

^{80/} Petitioners suggest that "guidelines" under Section 304 would be significantly more flexible than the regulations under Section 301. E.g., Petitioners' Brief at 15, 16, 18-21. There is no basis in the statute or the legislative history for assuming that Section 304(b) guidelines would allow major variation from plant to plant instead of being specific. The term "guideline" is also used in Section 304(h), 33 U.S.C. §1314(h), which section mandates EPA to establish specific minimum requirements for state programs. Obviously minimums are to be minimums and such specific requirements can be established by "guidelines" or by "regulations" under the Act. Thus, petitioners' interpretation of and emphasis on the word "guideline" is no more than a make weight argument in petitioners' analysis of Sections 301 and 304. Petitioners also contend that the U.S. District Court decision in NRDC v. Train, 6 ERC 1033 (D.D.C. 1973) supports their position. Pet. Brief at 13. The case simply holds that EPA is required by Section 304(b) to publish effluent limitations guidelines.

Second, these Section 301 effluent limitations play a crucial role in establishing water quality related effluent limitations and in the certification process which the states conduct with respect to federal proceedings which allow discharges to occur under other statutory authority.

Absurd results are reached under the water quality provisions of Section 303(d)(1)(A) if effluent limitations may not be established under Section 301. That section requires each state to identify "those waters within its boundaries for which the effluent limitations required by Section 301 (b)(1)(A) and Section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters."^{81/} Water quality standards are usually defined in precise quantitative terms: "x" parts per thousand of total dissolved solids or a temperature level of "y" degrees Fahrenheit.^{82/} It is impossible to relate the general statutory standard of best practicable or best available technology to a water quality standard until it is given particular definition in terms of the discharges being considered. Thus, Section 301 effluent limitations can be related to these precise values only if these limitations are themselves precise numerical quantities. Therefore, Section 303(d)(1)(A) makes sense only if establishment of particularized Section 301 effluent limitation standards was intended.

^{81/} 33 U.S.C. §1313(d)(1)(A).

^{82/} E.g., New York State standards for class "AA" waters require that for concentration of total dissolved solids "in no case shall it exceed 500 milligrams per liter." 6 N.Y.C.R.R. §701.4.

It is important to emphasize that the water quality restrictions of Sections 302 and 303 do not mention Section 402, thereby demonstrating that Section 301 effluent limitations are to be established independently of Section 402.

Section 401(a)(1) requires each applicant for a federal license permitting a discharge to obtain a state certification that its proposed discharge will comply with Sections 301 and 306 of the Act and further requires:

"In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 . . . the State shall so certify." ^{83/}

This last provision is utter nonsense if no effluent limitations can be established under Section 301. Since the statutory standards of Section 301 were fixed the day the Act was passed, certification that no applicable Section 301 effluent limitation exists must mean that establishment of more particularized Section 301 effluent limitations was intended.

Finally, enforcement of the Act's requirements is provided for by two provisions: enforcement by the federal Administrator is governed by Section 309^{84/} and enforcement by citizens' suits is governed by Section 505.^{85/} Both provisions assume that

^{83/} 33 U.S.C. §1341.

^{84/} 33 U.S.C. §1319.

^{85/} 33 U.S.C. §1365.

Section 301 effluent limitations will be established under Section 301 and independent of Section 402.

Under Section 309, the EPA Administrator is required to take remedial action whenever he

"finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State," 86/

Thus, this section contemplates that Section 301 effluent limitations will be developed which are independent of and enforceable apart from a permit issued under Section 402. These Section 301 effluent limitations must be specific and precise since violation of Section 301 subjects a discharger to civil penalties of a substantial nature:

"Any person who violates section 301, 302, 306, 307 or 308 of this Act or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act . . . shall be subject to a civil penalty not to exceed \$10,000 per day of such violation." 87/

86/ 33 U.S.C. §1319(a) (3) (emphasis added).

87/ 33 U.S.C. §1319(d) (emphasis added).

There is also the possibility of substantial criminal penalties under Section 309(c)(1) where there has been willful or negligent violation of Section 301.^{88/}

In discussing the requirements of Section 309, petitioners presented to the Court only those parts of the statutory language which refer to violations of Section 402 permits that implement the provisions of the Act, including Section 301, and omit entirely from their presentation those parts which require independent enforcement of Section 301 itself. Petitioners' Brief at 24-25. Amicus does not question that violation of permit conditions leads to possible liability, but there can be no question that in addition to such actions, action may be independently taken for violation of Section 301 itself. Petitioners' selective quotation simply masks the fact that Congress clearly expected the Administrator to establish enforceable Section 301 effluent limitations pursuant to Section 301 itself and independent of Section 402 permits.

Section 505, which governs enforcement of the Act through citizens' suits, permits one to sue "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this Act" ^{89/} For the purposes of that section, "effluent standard or limitation" is defined to be "an effluent limitation or other limitation under section

^{88/} 33 U.S.C. §1319(c)(1).

^{89/} 33 U.S.C. §1365(a)(1).

301 . . . or . . . a permit or condition thereof issued under
Section 402"^{90/}

In sum, the enforcement provisions of the Act make clear that Congress intended that Section 301 effluent limitations would be established under Section 301 itself and independent of any other provision of the Act, including Section 402.

Petitioners contend, however, that EPA "has no power to establish [Section 301] effluent limitations by regulation" because, unlike other provisions of the Act such as Sections 304(b) and 306 which expressly require promulgation of regulations, Section 301 does not. See Petitioners' Brief at 17. This position wholly overlooks Section 501(a) which states:

"The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."^{91/}

It is important to understand the effect of adopting petitioners' argument that effluent limitations can only be established under Section 304 rather than Section 301. Section 304 is not mentioned as one of the sections whose violation is actionable under the enforcement provisions of Section 309 or 505. The list of enforceable sections include the major

^{90/} 33 U.S.C. §1365(f) (emphasis added).

^{91/} 33 U.S.C. §1361(a).

regulatory programs: Section 301 (effluent limitations), Section 302 (water quality standards), 306 (new source standards), 307 (toxic discharge standards), and 402 (permit programs). E.g., Section 309(a)(3); Section 505(f). Since there are provisions for the issuance of specific orders under Section 302 and for the promulgation of regulations under Sections 306 and 307, this would provide vehicles of enforcement outside the permit program for all the regulatory systems except that covering existing sources. What the petitioners seek to achieve through their argument is the creation at the center of the Act of a loophole as big as a barn door. If successful, they will establish a system by which existing sources will only be reviewable on a permit by permit basis while all other discharge control programs will be reviewable on the basis of general standards encased in regulation. There is no indication within the Act or the legislative history that Congress intended this result. The creation of such an omission would go a long way to destroy the effectiveness of the Act's enforcement scheme.

Petitioners also contend that their interpretation of the Act is justified in part on grounds that the Court of Appeals is given jurisdiction over only a limited number of cases under the Act and that Congress did not intend to burden their dockets with the requirement of reviewing effluent limitation standards for existing sources which are the Section 304(b) guidelines under petitioners' interpretation.^{92/} This appeal to judicial

^{92/} Petitioners' Brief at 11-13.

economy is a Trojan horse. If Section 301 effluent limitations can be established only pursuant to Section 402 as permit conditions and not by regulations under Section 301, there will be innumerable challenges of permits before EPA and in the District Courts - approximately 75,000 permits are expected to be issued.^{93/} These cases will eventually come to the Court of Appeals and generally applicable effluent limitations for classes and categories of point source dischargers will have to be fashioned by the Appeals Courts based on the various ad hoc rulings of the District Courts. Thus, the eventual burden on the Court of Appeals could well be greater under petitioners' interpretation of the Act.

B. The Legislative History Demonstrates That The Act Mandates The Establishment Of Section 301 Effluent Limitations By Regulation

The legislative history of the Act makes clear that Congress intended that Section 301 effluent limitations would be established pursuant to Section 301 and independent of Section 402 permits. This conclusion is demonstrated by explicit references to "effluent limitations established under Section 301" as well as by discussion of "section 301 standards" and of Section 301 as being the "environmental control" section, all of which are consistent only with the interpretation that

^{93/} See EPA, Water Quality Strategy Paper, supra, note 19.

enforceable effluent limitations are to be established under Section 301 itself, and not only in Section 402 permits.

It is important to emphasize at the outset that the legislative history demonstrates that Congress fully intended EPA to issue regulations pursuant to Sections 301 and 304(b) of the Act, just as EPA has done in this case, thereby demonstrating, contrary to petitioners' contention, that EPA's rulemaking proceeding is wholly consistent with the Act's requirements under Section 301 and that jurisdiction of this case is properly vested in this Court. Thus, Senator Bentsen, a key member of the Senate Public Works Committee, stated during debate on the Senate bill:

"In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1976, [now July 1, 1977], which comply with specifically defined levels of effluent control and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304, these 1976 [now 1977] goals shall be at least . . . the 'best practicable control technology currently available' for [industrial] point sources" 94/

With respect to EPA's authority to establish effluent limitations pursuant to Section 301, the House Report on the bill in discussing the Administrator's authority under Section 302 to change or modify Section 301 effluent limitations states:

94/
Leg. Hist. at 1283 (emphasis added).

"Proposed effluent limitations under section 302 shall in no case operate to delay the application of any effluent limitation established under section 301." 95/

Similarly, the Conference Report on the bill says:

"Section 302 requires more stringent standards than those required by section 301 if such effluent limits would interfere with attaining the 1981 interim goal." 96/

The Report then states that the House Amendment to Section 302,

"would permit the setting of more stringent standards than those required by section 301, essentially using the same tests as the Senate bill." 97/

Similarly, the legislative history regarding the state certification provision of the Act, Section 401, shows that Congress intended Section 301 to have independent status and effect. During Senate debate on the original Senate bill, Senator Muskie explained the scope of Section 401 and said:

95/
H. R. Rep. No. 92-911, 92d Cong., 2d Sess. 104 (1972), Leg. Hist. at 791 (emphasis added).

96/
S. Rep. No. 92-1236 (Conf. Rep.), 92d Cong., 2d Sess. 1211 (1972), Leg. Hist. at 304 (emphasis added).

97/
Id., at 305 (emphasis added).

"This section . . . requires that any applicant for a Federal license or permit provide the licensing agency with a certification from the State in which the discharge occurs that any such discharge will comply with section 301 and 302, which are the environmental control sections." 98/

Likewise, the House Report on the bill states:

"This [Section 401] certification must state that any such discharge will comply with the 'applicable' provisions of sections 301, 302 306, 307, and 316 of this Act." 99/

No reference is made to Section 402.

Finally, the legislative history of the two major enforcement provisions of the Act, Sections 309 and 505, repeatedly underscores the independent status of Section 301 requirements, violation of which is subject to both criminal and civil liability. Thus, the Senate Report on the bill states:

"When EPA finds anyone violating Sections 301, 302, 306, 307, 308, or 402, the agency must either issue an order that requires immediate compliance or bring a civil suit Anyone willfully or negligently violating a Section 402 permit or any of several other specific sections of the bill shall be liable to a fine of up to \$25,000 per day of violation and one year in jail. For a willful

98/ Leg. Hist. at 1388 (emphasis added).

99/ H. R. Rpt. No. 92-911, note 23, supra, at 121, Leg. Hist. at 1481 (emphasis added).

or negligent violation of Sections 301, 302, 306, 307, or 402, the fine shall be not less than \$2,500 per day." 100/

Similarly, the House Report states:

"Section 309 contains provisions for Federal enforcement of violations of an unpermitted discharge under section 301 or a violation of any permit condition or limitation" 101/

Regarding the citizen suit enforcement provision, Section 505, the Senate Report states:

"Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act Citizens are granted authority to bring enforcement actions for violations of schedules or timetables of compliance and effluent limitations under section 301, . . . and any condition of any permit issued under section 402." 102/

In sum, the legislative history fully supports the conclusion based on the plain language and structure of the Act that Section 301 effluent limitations are to be established

100/
S. Rep. No. 92-414, note 27, supra, at 63, Leg. Hist. at 1481 (emphasis added).

101/
H.R. Rep. No. 92-911, note 23, supra, at 114, Leg. Hist. at 801 (emphasis added).

102/
S. Rep. No. 92-414, note 27, supra, at 82, Leg. Hist. at 1500 (emphasis added).

and enforced, by means of criminal and civil penalties, independent of any other section of the Act, particularly Section 402.

EPA acted in compliance with the Act's requirements in promulgating regulations establishing the Section 301 effluent limitations which have been challenged in this case. Section 509 of the Act grants this Court jurisdiction to review actions of the Administrator under Section 301. Thus, petitioners, as interested parties, have properly filed their petition for review with this Court and this Court should reject petitioners' contention that it lacks jurisdiction to review the challenged regulations.

II. THE ACT MANDATES ESTABLISHMENT OF NATIONAL,
UNIFORM STANDARDS FOR CONTROLLING DISCHARGES
OF POLLUTANTS WITHIN CATEGORIES OF INDUSTRY

In the regulations challenged in this case, EPA established national, uniform effluent limitation standards ^{103/} for specific, carefully defined classes and categories of industry, as required by Sections 301, 304, and 306 of the Act. ^{104/} Amicus contends that this is required by the Act. Petitioners urge that each of the thousands of point sources of industrial pollution must be analyzed individually under the entire array

^{103/} This phrase is used for convenience to embrace the Section 301 "effluent limitations" and Section 306 "standards of performance" as well as the Section 304(b) "effluent limitation guidelines" which have been promulgated by the regulations in issue.

^{104/} Amicus contends that EPA is required by the Act to publish national uniform Section 301 effluent limitations. EPA believes that it may make "adjustments" for particular point source dischargers based on criteria set out in a "variance clause" which has been incorporated in the regulations. See, e.g., 40 C.F.R. §§415.22, 415.22; 39 Fed. Reg. 9618. Amicus believes that this "variance clause" violates the Act's requirements. Accordingly, amicus has challenged EPA's adoption of the "variance clause" (which is identical for most regulations issued pursuant to Sections 301, 304(b), and 306, and provides criteria and procedures for "adjusting" the effluent limitations established by the challenged regulations) in the case of NRDC v. EPA, Dkt. No. 74-1258 (2d Cir.), filed Feb. 22, 1974. Accordingly, amicus argues here that the Act requires EPA to promulgate national, uniform effluent limitation standards for specific classes and categories of point source dischargers. Since the variance clause is not in issue in this case, no analysis of the clause or its implications will be made in the argument.

of factors set out in Section 304 of the Act. Petitioners oppose the establishment of effluent limitations by class and category of industry. Petitioners' position is not only inconsistent with the requirements of the Act, but would also result in impractical and chaotic administration of the Act, since each of the approximately 75,000 permit proceedings would become a de novo standard setting proceeding. Such a result would severely tax the agency's resources and seriously impair its ability to meet its obligations under the Act. Congress foresaw and avoided this course in mandating the establishment of national, uniform effluent limitations by classes and categories of point sources. The position of EPA must prevail over that of petitioners.

It is important to emphasize that the discussion in Section I, supra, has demonstrated that the Act requires EPA to establish Section 301 effluent limitations pursuant to Section 301 itself and independent of Section 402. The analysis of this section confirms and underscores the conclusion which follows from the analysis and discussion in Section I.

The conclusion that the Act requires establishment of national, uniform effluent limitations under Section 301 for specific classes and categories of point source dischargers follows from two factors: the explicit requirements of Sections 301 and 304 regarding the application of the "classes and categories" concept; and the legislative history which elaborates upon the meaning of these statutory requirements

and which confirms amicus' interpretation of the Act. The basic reason Congress developed the "classes and categories" concept was to enable EPA to prescribe uniform, federal standards which were deemed essential for effective abatement of the pollution of the Nation's waters.

A. Sections 301 and 304

Section 301 prescribes two effluent limitation standards for existing point sources - one to be achieved by July 1, 1977, the other by July 1, 1983.^{105/} These standards are to be "defined" or "determined," by regulations developed pursuant to Section 304(b).^{106/} The sections are identical in structure, and use essentially identical language. This unity emphasizes the common objectives of these sections, particularly that of utilizing specific classes and categories of point sources as the basis for prescribing effluent limitations.

Thus, Section 304(b)(1)(A), pursuant to which the Section 301(b)(1)(A) "best practicable" standard is to be "defined," requires publication of effluent limitations guidelines which shall:

^{105/}
Section 301(b)(1)(A), (b)(2)(A); 33 U.S.C. §§1311(b)(1)(A), (b)(2)(A).

^{106/}
Section 304(b)(1)(A), (b)(2)(A); 33 U.S.C. §§1314(b)(1)(A), (b)(2)(A).

" . . . identify, in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources" ^{107/}

Similarly, Section 304(b)(1)(A), pursuant to which the Section 301(b)(1)(A) "best available" standard is to be "determined" ^{108/} also requires publication of effluent limitations guidelines "for classes and categories of point sources." ^{109/}

Then, Section 304(b)(1)(B) and (b)(2)(B), which relate to the "best practicable" and "best available" standards, require the regulations to

"[s]pecify factors to be taken into account in determining . . . measures and practices to be applicable to point sources . . . within such categories or classes." ^{110/}

^{107/}
33 U.S.C. §1314(b)(1)(A) (emphasis added).

^{108/}
This is the term used in Section 301(b)(2)(A), 33 U.S.C. §1311(b)(1)(A), as compared with "defined" in Section 301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A). No difference in substance or operation of the two subsections is reflected by this different terminology, nor is any suggested by the legislative history.

^{109/}
33 U.S.C. §1314(b)(2)(A).

^{110/}
Section 304(b)(1)(B), 33 U.S.C. §1314(b)(1)(B) (emphasis added). Section 304(b)(2)(B) is virtually identical:

"specify factors to be taken into account in determining the best measures and practices . . . to be applicable to any point source . . . with such categories or classes."

In sum, these provisions make clear that Congress intended that effluent limitations be developed for specific classes and categories of point sources. Section 306, which applies to new sources and which also requires establishment of effluent limitations ^{111/}for classes and categories of point sources indicates more clearly what Congress expected EPA to do in determining appropriate "classes and categories." ^{112/}In Section 306(b)(1)(A), Congress listed 27 industrial categories for which "at a minimum" EPA was required to develop effluent limitations. ^{113/}Congress recognized that significant differences existed among both plants and effluent discharges included in these broad industrial categories. Therefore, Congress

110 cont'd/

In only one instance do Sections 301 and 304(b) differ in referring to "classes and categories of point sources" as the basis for establishing effluent limitations. This occurs in Section 301(b)(1)(A). The detailed discussion of the reasons why the phrase was included in Section 301(b)(2)(A) as a result of House amendments to the Senate bill and adoption of a Conference substitute is presented at pages 54-56, *infra*; in sum, this difference and the process which produced it reinforces the conclusion evidenced by the provisions quoted above that Congress intended that uniform effluent limitations be developed for specific classes and categories of point sources.

^{111/}Under Section 306, "effluent limitations" are called "standards of performance," 33 U.S.C. §1316(a)(1).

^{112/}33 U.S.C. §1316

^{113/}33 U.S.C. §1316(b)(1)(A).

provided that:

"The Administrator may distinguish among classes types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous)." ^{114/}

Factors which EPA considers in determining appropriate classes and categories of point sources for the regulations in issue include those specified in Section 304(b) ^{115/} and are set out in the "Advance Notice of Public Review Procedures" published by EPA to inform interested persons about the specific steps involved in developing effluent limitation regulations. ^{116/}

Thus, the dispute between petitioners on the one hand and EPA and Amicus on the other is not whether there are variations among industrial discharges - there clearly are. The basic question is how Congress instructed EPA to deal with these variations in developing effluent limitations. EPA and Amicus contend that the Act requires EPA to identify specific classes and categories of point sources for which effluent limitations are to be developed so that these limitations can be applied uniformly to the point sources within each such category. Petitioners argue that the Act requires publication of general guidelines and subsequent adjustment and revision

^{114/} 33 U.S.C. §1316(b) (1) (A).

^{115/} 33 U.S.C. §1314(b).

^{116/} See ¶2, 38 Fed. Reg. 21202 (1973).

of the guidelines based on the individual characteristics of the applicant's discharge, or essentially de novo development of the effluent limitations for individual permits.

B. The Legislative History of Sections 301 and 304

Two aspects of the legislative history demonstrate that Amicus' interpretation of the Act is correct. The first consists of relevant portions of the detailed report on the meaning and operation of Sections 301 and 304 which Senator Muskie, principal author of the Act, submitted to the Senate during final debate on the Conference Report. The second consists of a detailed discussion of the legislative history pertinent to Section 301(c) of the Act, a provision which was developed in Conference in order to resolve differences regarding the 1983 effluent limitation requirements.

The clearest, most detailed discussion in the legislative history about the meaning and operation of Sections 301 and 304 is contained in Senator Muskie's detailed report. As relevant to the issues involved in this case, Senator Muskie affirmed three points, which are basic to Amicus' position. First, the Conferees agreed that Section 301 effluent limitations would be established for specific classes and categories of point sources as defined by Section 304(b).^{117/} Second, the

^{117/} Leg. Hist. at 171. ("Section 304(b), as agreed to by the Conferees, requires that the Administrator publish regulations which shall provide guidelines for the establishment of the effluent limitations to be achieved by categories and classes of point sources (other than publicly owned treatment works) pursuant to section 301(b) of the Act.").

Conferees intended that the various factors which must be considered in determining "best practicable" and "best available" control technology must be taken into account at the time effluent limitations are established and not when they are applied to particular dischargers.^{118/} Third, the Conferees intended that Section 301 effluent limitations are to be uniform and that the only variance from such uniformity permitted by the Act is that allowed by Section 301(c), which applies only to the effluent limitations which implement the 1983 "best available" standard:

"Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." ^{119/}

These conclusions are also stated in the Conference Report:

"The conferees intend that the Administrator or the State, as the case may be, will make

^{118/} Leg. Hist. at 172. ("The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class.").

^{119/} Id.

the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable." ^{120/}

As stated at the beginning of this brief,^{121/} a basic objective of the Act is to develop national, uniform, point source discharge effluent limitations. Congress was interested in assuring that industries could not shop among local jurisdictions for those which for reasons of economic development, local dependence on a dominant industry, or lack of concern for the effects of pollution would grant the industry permission to discharge pollutants to the Nation's waters at rates exceeding the national standard. This emphasis on uniformity appears repeatedly in the legislative history.^{122/}

Thus, national uniformity was the first consideration which Senator Muskie laid before the Senate during its final

^{120/} S. Rep. No. 92-1236, note 27, supra, at 121 (1972); Leg. Hist. at 304.

^{121/} See pages 4-7, 17-18, supra.

^{122/} See Leg. Hist. at pages 132, 156, 162, 172, 209, 263, 309, 451-53, 466-67, 473-75, 516-17, 577, 711, 727, 1219, and 1405.

debate on the bill.^{123/} The point was emphasized by Senator Muskie in the detailed analysis of the Act which he submitted to the Senate during final debate on the Conference Report. First, in discussing the resolution by the Conferees of the relationship of the cost-benefit analysis required by Section 304(b) to predicted discharges, Senator Muskie reported^{124/}

^{123/}
Leg. Hist. at 162.

"Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.

"As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977."

^{124/}
This same point on the consideration of economic impact was made explicitly by Rep. Dingell in the House:

"The conference report emphasizes on page 121 a very important point. The report states:

'The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.'

"Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided."

Leg. Hist. at 254-55.

"The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community." 125/

Second, as already shown, Senator Muskie made the same point in discussing the possibility of obtaining variances under 126/ Section 301(c) from the "best available" standard.

Uniformity was also a primary goal sought by the Administrator of EPA. In commenting at length on the final bill, William Ruckleshaus, then Administrator of EPA, stated:

"Despite the national character of pollution, it has not been dealt with uniformly. Varying local revenue capabilities, economic pressures, and citizen interest have often stagnated community and State initiative. To assure equity and national progress the Federal Government undertook to coordinate and support the many various efforts to control water pollution

"To overcome these existing disparities, the Administration proposed that 'standards be amended to impose precise effluent requirements on all industrial sources.' The enrolled bill has done so." 127/

In sum, the legislative history confirms the basic points of Amicus' position, particularly that effluent limitations are

125/
Leg. Hist. at 170.

126/
Leg. Hist. at 172. The quotation is set out above at 55.

127/
Leg. Hist. at 156.

to be uniform. The latter point is the keystone of Amicus' argument and underscores the conclusion that petitioners' position - that effluent limitation standard setting should be established by ad hoc, individualized actions in the permit process - is wholly inconsistent with a basic purpose of the Act.

An example from the regulation in issue clarifies the nature of the effluent limitation standard setting process and demonstrates its conformity with the Act's requirements. EPA did not adopt one effluent limitation for the entire phosphate manufacturing category. Three separate subcategories were established and each was carefully analyzed with respect to such factors as process differences, engineering differences; cost-benefit analyses, and age as noted in EPA's "Advance Notice of Public Review Procedures,"^{128/} discussed above at page 24. The effluent limitation promulgated for each subcategory are either a maximum allowable discharge or a range.^{129/} And all of the effluent limitations for the subcategories within the phosphate manufacturing category comprise a range of effluent limitations, fully consistent with the concept quoted from the legislative history by

^{128/}
38 Fed. Reg. 21202 (1973).

^{129/}
E.g., 40 C.F.R. §422.22, 39 Fed. Reg. 6584 (1974).

petitioner in its brief at page 29.^{130/}

Petitioners seek to counter the "uniformity" argument by contending that providing for states to become Section 402 permitting authorities, Congress meant to create substantial state control over the determination of effluent limitations, which are the central and critical standards of the Act. This is exactly the opposite of what Congress meant to accomplish. The federal Administrator sets every standard in the Act, other than Section 303 ambient water quality standards. Thus, Congress granted the federal government the authority and imposed upon it the duty to set effluent limitation standards but only if granted by the federal EPA Administrator for a program which would meet the federal standards established pursuant to the Act. Thus, Rep. Blatnik, Chairman of the House Committee on Public Works and a main sponsor of the bill, wrote, in his summary report of the bill:

"All permits issued under this program shall be consistent with the specific requirements of the bill, including effluent limitations" ^{131/}

Petitioners' contentions must be rejected as being wholly inconsistent with the requirements and objectives of the Act.

^{130/}

E.g., ". . . for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category." Leg. Hist. at 1468.

^{131/}

Leg. Hist. at 362.

Petitioners' interpretation, if adopted, would substantially revise the Act, replacing the comprehensive, integrated pollution control scheme based on applying and enforcing national, uniform effluent limitations with a system of essentially ad hoc, uncoordinated, individualized state standard setting procedures which would closely resemble in structure and operation the pre-1972 water pollution control legislation which Congress found to be ineffective and inadequate.

III. EPA'S REGULATIONS WERE PROPERLY PROMULGATED AND SUFFER FROM NO PROCEDURAL IRREGULARITIES

Petitioners allege that EPA shifted in the midst of the rulemaking process from proposing effluent limitations guidelines under Section 304 to promulgating effluent limitation standards under Section 301. Accordingly, petitioners contend that EPA violated the requirements of the Administrative Procedure Act by failing to provide adequate notice^{132/} and that, therefore, the regulations must be set aside. There was no lack of notice about any relevant aspects of the rulemaking proceeding involving the legal basis for EPA's actions. Petitioners' arguments on these points are baseless and must be rejected.

On September 7, 1973, EPA published its proposed effluent limitation regulations for the phosphate manufacturing industry.

^{132/} Petitioners' Brief at 16-17.

On their face, these regulations were proposed pursuant to both Sections 301 and 304 of the Act in keeping with EPA's position that the Act requires that 301 and 304 work together in a closely-meshed manner:

"Notice is hereby given that effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources set forth in tentative form below are proposed by the Environmental Protection Agency (EPA) for . . . the phosphate manufacturing category of point sources pursuant to sections 301, 304(b) and (c), 306(b), and 307(c) of the Federal Water Pollution Control Act" 133/

This announcement of the legal basis for the proposed regulations is followed by a brief description of the statutory scheme which emphasizes the integral connections between Sections 301 and 304, a relationship which has been discussed in detail above.^{134/} In particular, the requirement that effluent limitations under Section 301 be defined pursuant to Section 304(b) is set out. Thus, the Federal Register publication provided petitioners with full notice of this position at the time the regulations in issue were proposed.

The final regulations were promulgated on February 20, 1974 and carefully tracked the language of the notice of proposed rulemaking:

^{133/}
38 Fed. Reg. 24470 (1973) (emphasis added).

^{134/}
See pages 14-17, supra.

"The purpose of this notice is to establish final effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources in the phosphate manufacturing category of point sources This final rulemaking is promulgated pursuant to sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act" 135/

There is no fatal variance between legal authorities in these two notices nor is there any showing that EPA is undertaking in the second publication something it was not doing in the first.

Petitioners seek to create the impression that the proposed regulations were guidelines of a loose and flexible nature, while the final regulations were rigid standards and that this purported change represents an impermissible shift in EPA's position between the two publications. This is a false impression. The proposed regulations comprised essentially two sets of effluent limitations, one for daily maximum discharges, the second a maximum daily average over a thirty day period. In both the proposed and final regulations, these effluent limitations are generally expressed as a single allowable level of discharge with the exception of pH which is given as a range. Thus, in phosphorous consuming subcategory the proposed regulations set out the following effluent limitations as the best practicable control technology for manufacture by

135/
39 Fed. Reg. 6580 (emphasis added).

the mercury cell process:

Total Suspended Solids . . . Maximum for any one day 1.4 kg/kg product (1.4 lb/1,000 lb).
Maximum average of daily values for any period of thirty consecutive days 0.7 kg/kg of product (0.7 lb/1,000 lb).
Total Dissolved Solids . . . Maximum for any one day (10.0 kg/kg product (10.0 lb/1,000 lb).
Maximum average of daily values for any period of thirty consecutive days 5.0 kg/kg of product (5.0 lb/1,000 lb).
pH . . . 6.0 to 9.0. 136/

In the final regulations the standards for total suspended solids and pH remained the same while that for total dissolved solids was changed to allow discharges of specific amounts of dissolved substances, i.e., of phosphorous, fluoride, and elemental phosphorous.
137/

This is a typical example of the changes EPA made between proposed and final regulations within the 3 finely drawn sub-categories of the phosphate manufacturing industry. The degree of specificity and precision is the same in both sets of regulations. There is simply no change from loose flexibility to rigid, mechanical standards. The type of regulation first proposed by EPA is the type promulgated by the agency at the end of the rulemaking procedure.

In sum, there is no basis for petitioners' argument that they were denied sufficient notice under the Administrative

136/
40 C.F.R. §422.22(a), 38 Fed. Reg. 24475 (1973).

137/
40 C.F.R. §422.22(a), 39 Fed. Reg. 6583 (1974).

Procedure Act or that there are any other procedural failings in the promulgation of the regulations.

CONCLUSION

For the reasons stated above, this Court has jurisdiction of this action and, on the issues addressed, judgment should be rendered in favor of respondent, Environmental Protection Agency.

Respectfully submitted,

ANGUS MACBETH
EDWARD L. STROHBEHN, JR.

Attorneys for Natural Resources
Defense Council, Amicus Curiae
Office and P. O. Address
15 West 44 Street
New York, New York 10036
Tel. No.: (212) 869-0150

Dated: December 13, 1974

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1687

HOOKEE CHEMICALS AND PLASTICS CORPORATION,
STAUFFER CHEMICAL COMPANY AND MONSANTO COMPANY
Petitioners

v.

RUSSELL E. TRAIN

Respondent

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent
is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, N.Y.

That on the 13th day of December, 1974, deponent
served the within Brief for Amicus Curiae N.R.D.C.
upon Robert C. Barnard, Cleary, Gottlieb, Stein & Hamilton
1250 Connecticut Ave, N.W., Washington, D.C.

John J. Zimmerman, Room 2335, Main Justice Building

Dept. Of Justice, Washington, D.C. 20530

Attorney(s) for the _____ in the action, the address designated by said attorney(s) for the
purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
office official depository under the exclusive care and custody of the United States Post Office department
within the State of New York.

Albert Sensale

Sworn to before me,

ALBERT SENSALÉ

This 13th day of DECEMBER 1974

Michael Silberzweig

MICHAEL SILBERZWEIG
COMMISSIONER OF DEEDS
City of New York 2-1465
Certificate filed in Kings County
Commission Expires Sept. 1, 1975